Office Supreme Court U. S.
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In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 756.

CHARLES DAVIS,

Plaintiff in Error.

vs.

THE ELMIRA SAVINGS BANK.

Brief for Metropolitan Savings Bank.

AUG. S. HUTCHINS,
Of Counsel.

Supreme Court of the United States.

CHARLES DAVIS,
Plaintiff in Error,

against

THE ELMIRA SAVINGS BANK.

Brief filed in behalf of the Metropolitan Savings Bank.

Statement.

The Metropolitan Savings Bank is a corporation existing by and under the Laws of the State of New York. The said Savings Bank was a depositor in and now is a creditor of a National Bank now in process of liquidation. The said Savings Bank claims a preference in the funds now in the hands of the Receiver of such National Bank under the Laws of the State of New York.

Point I.

The New York Statute, being Chapter 689, Laws of 1892, covered the case of deposits by Savings Banks made in National Banks as well as in State Banks.

Sections 118 and 130 of the Banking Laws of the State of New York, read together, show clearly that the Legislature so intended.

Section 118 reads as follows:

"There may be kept an available fund not exceeding ten per centum of the whole amount of deposits with such corporation on hand or deposit in any bank in this State organized under any law of this State or of the United States."

Section 130 provides:

"All the property of *any* bank or Trust Company which shall become insolvent shall, after providing for the payment of the circulating notes, if it have any, be applied by the trustees, assignees or Receiver thereof, in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank."

The wording of the statute seems very clear and explicit, and no reason has been given or, it would seem, can be given in equity or good morals for excepting from this remedial provision such deposits in a National Bank. On the contrary, the natural intendment would seem to lead to such construction as would preserve entire the earnings of the thrifty poor of any community.

Again, the highest Court of the State having construed this act on this question, its determination will not be lightly disturbed.

Supervisors *vs.* Stanley, 105 U. S., 305, 310, 311.

Point II.

These provisions of the State statute are within the proper sphere of State legislation

The rule governing the point in question was clearly and distinctly laid down by this Court in the case of Waite *vs.* Dowley, 94 U. S., 527, 533. At the latter page Mr. Justice Miller, delivering the opinion of the Court, says: "We have more than once held in this Court that the National Banks organized under the Acts of Congress are subject to State legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation." See also National Bank *vs.* Commonwealth, 9 Wall., 353; Tel. Co. *vs.* Mass., 125 U. S., 550–1.

In the latter case the Court says: "They (National Banks) are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the Nation. *All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging their duties to the Government, that it becomes unconstitutional.*"

It has not been claimed by those who attack the constitutionality of this State Statute that in its operation it will be found to embarrass or impede, much less destroy, the efficiency of the National Bank as a federal agency, or even in its ordinary every-day duty as a depository of money. The law simply places the State and National Bank on the same footing in this respect.

Point III.

The effect of the acts of the parties as controlled and governed by the State Statute was to create in the Sav-

ings Bank a vested although contingent right which upon the failure of the National Bank became fixed and certain, and which covered all the funds which came into the hands of the Receiver.

The claim or right which arose upon the deposit by the Savings Bank with the National Bank seems in many respects analogous to the dower right which arises in the State of New York upon a marriage where the husband at the time of such marriage is or subsequently, during the coverture of the wife, becomes seized of real property. The right of dower as it exists to-day under the provisions of the Revised Statutes of the State of New York, has been held to be a vested, although an inchoate and contingent right, which becomes fixed, certain and effective only after the decease of the husband. It is, however, a vested, present and existing right, and attaches to all present, or after-acquired real estate of the husband.

In Lawrence *vs.* Miller, 2 Comst. (2 N. Y. Rep.,) 250 Shankland, J., writing the opinion of the Court, says: "The right of dower attaches at the instant of marriage, and cannot be defeated by the alienation of the husband alone. (1 Cruise's Dig., 136.) In the case of Kelly *vs.* Harrison (2 John. Cas., 29), the principle was established, that by the marriage and seizen of the husband, the wife's right of dower became a vested right, and could not be impaired by the subsequent acts of the government and of course not by subsequent legislation." * * *

"The 16th Section of our Statutes concerning dower (1 R. S., 442) places the wife's claim on the same basis as that of jointure. She cannot be barred or prejudiced by any act in the one case which would not prejudice the other. A jointress is considered a purchaser, marriage alone being considered a valuable consideration."

We seem in the case at bar to have a very analogous right, and one that has now become a subsisting, fixed and definite right of title as to such funds as may have come into the hands of the Receiver upon the failure of the National Bank.

The effect of the contract between the parties, that is, the deposit by the Savings Bank in the National Bank as governed and controlled by the statute, was that all the assets of the National Bank became immediately subject to this right or claim of preference which, however, covered them generally and not specifically, and was liable to be defeated as to any specific deposit by its transfer at any time previous to the failure of the bank and became fixed and certain as to any such specific deposit only upon that event. It was, however, during all the time a vested right existing in favor of the Savings Bank, and by reason of its existence an equitable lien attached to all the deposits and other property of the National Bank. Every depositor depositing in the National Bank did so with the notice that his deposit was covered by and subject to this right or claim of preference in the same manner as one buying land from a married man takes it subject to the possibility of dower on the part of the wife.

As is said by Gray, J., writing the opinion below (142 N. Y., page 597): "In the present case while a going concern, it (the National Bank) entered into an engagement with the Savings Bank which the State law required and regulated; which vested in the latter superior rights or equities and which in the possible event of future insolvency would give to it a prior claim to payment from the assets. When that event happened and the Receiver was appointed he took over the property of the insolvent concern as trustee for its creditors and shareholders under the same conditions as the bank held it and subject to the right of the plaintiff to be first paid in full."

Point IV.

Statute in question is not in conflict with the provisions of the Federal Statute.

If we have established the propositions that the State Statute covered the deposits in question, that such statute is within the proper sphere of State legislation, and by reason of such statute governing the acts of the parties a pre-existing right or claim became fixed and vested in favor of plaintiff at the time of the failure of the bank, but one question remains to be considered.

That question is as follows: Do the provisions of the Federal Statute prohibit all preferences, even those the result of a pre-existing claim or right in favor of one or more classes of depositors? The contention of the Receiver is that the Federal Statute plainly and unmistakably enacts that under no circumstances shall any creditor of a defunct National Bank receive more than his *pro rata* share of the assets.

Such contention seems to be in direct conflict with the decision of this Court in Scott *vs.* Armstrong, 146 U. S., pages 499, 510. Mr. Justice Fuller, delivering the opinion of the Court, says, at the latter page: "Undoubtedly any disposition by any National Bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes or to prefer one creditor to another is forbidden, *but liens, equities or rights arising by express agreement or implied from the nature of the dealing between the parties or by operation of the law prior to the insolvency, and not in contemplation thereof, are not invalidated.* The provisions of the act are not directed against all liens, securities, pledges or equities whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency.

In the case at bar we have one of the exceptions so clearly pointed out in Scott *vs.* Armstrong. We have a right or equity implied from the nature of the dealings between the parties, and arising by operation of law, prior to the insolvency, and not in contemplation thereof.

Point V.

To uphold the validity of the State Statute could in no manner affect injuriously the future operations of national banks. On the contrary, it would be of great benefit to them, as not only confirming them in the holding of their present Savings Banks' deposits, but as an inducement to, and justification of, the increase of such deposits. A contrary decision must inevitably lead to the withdrawal of such deposits as they now have.

It has been suggested on the argument below that if the State be held to have the power to enact legislation which may result in the preferring of one class of creditors, it may in the future attempt to legislate so as to effect the preferring of other classes of creditors to an extent that would violate the spirit of the provisions of the Federal Act. The answer would seem to be the same as that made by Mr. Justice Miller, delivering the opinion in Waite *vs.* Dowley (*supra*). "This Court does not sit to try moot cases to solve a question which may never be raised by the parties entitled to raise it."

Another sufficient answer would seem to be that Congress has it in its power at any time to prevent by appropriate legislation any such attempt on the part of a State, should an attempt ever be made. It

would seem sufficient that the present statute does not and cannot in its operation impede the National Banks in their duties and powers as agents or instrumentalities of the Federal Government, nor does it enlarge or abridge the scope of their usefulness or their operation under the provisions of the Federal Statute.

Indeed, we contend for a construction of the statute the effects of which will be as beneficial to National Banks as to Savings Banks in their dealings with one another.

AUG. S. HUTCHINS,
Of Counsel for Metropolitan Savings Bank.

161 U.S. 275

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 756.

CHARLES DAVIS,
Plaintiff in Error.

versus

THE ELMIRA SAVINGS BANK.

BRIEF FOR DEFENDANT IN ERROR.

EDWARD G. HERENDEEN,
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JAMES C. CARTER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 756.

CHARLES DAVIS,
Plaintiff in Error,
versus
THE ELMIRA SAVINGS BANK.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This cause comes before the Supreme Court of the United States upon a writ of error based upon a judgment rendered in the Court of Appeals of the State of New York, June 5th, 1894, affirming, with costs, the judgment of the General Term of the Supreme Court of the State of New York, Fourth Department, entered in Chemung County, State of New York, December 27th, 1893, in favor of The Elmira Savings Bank, the defendant in error. By said judgment it was decreed that The Elmira Savings Bank recover judgment against Charles Davis, as Receiver of The Elmira National Bank, plaintiff in error, for $44,-

325.97 including costs, and the same was adjudged and decreed a preferred claim to be paid in full out of the assets which have or may come into the hands of the said receiver who was directed to pay the same accordingly, or to certify the same to the Comptroller of the Currency of the United States to be paid in full as a preferred claim, in due course of administration.

The decision of the General Term in this case is reported in 73 Hun, 357.

The decision of the Court of Appeals in this case is reported in 142 N. Y. 590.

The plaintiff in error is the receiver of the insolvent Elmira National Bank. The defendant in error is a savings bank organized under the laws of the State of New York.

Following a provision permitting savings banks to deposit surplus funds in national banks, Section 130 of the Banking Law of New York, being Chapter 689 of the Laws of 1892, thus provides: "All the property "of any bank or trust company which shall become "insolvent, shall, after providing for the payment of its "circulating notes, if it has any, be applied by the "trustees, assignees, or receiver thereof, in the first "place, to the payment in full of any sum or sums of "money deposited therewith by any savings bank, "* * * "

By the Revised Statutes of the United States, following a provision that receivers of national banks shall convert the assets into cash and pay the same over to the Comptroller of the Currency, it is enacted as follows :

"SECTION 5236. From time to time, after full pro-
"vision has been made for refunding to the United
"States any deficiency in redeeming the notes of such
"association, the Comptroller shall make a ratable
"dividend of the money so paid over to him by such
"receiver, on all such claims as may have been proved
"to his satisfaction, or adjudicated in a court of com-
"petent jurisdiction."

The defendant in error had a large deposit in the Elmira National Bank at the time when it became insolvent, and when the plaintiff in a error was appointed its receiver. It claims that under the laws of the State of New York and of the United States, it is entitled to have the amount of its deposits paid over to it by the plaintiff in error, first after the payment of the circulating notes of the insolvent bank has been provided for; and the highest tribunal of the State of New York has so decided. The plaintiff in error claims that the statutes of the State of New York in this respect conflict with the National Bank Act and are therefore unconstitutional and void.

The facts which are agreed upon by both parties are as follows:

The defendant in error is a savings bank corporation of Elmira, New York, incorporated under the laws of this state. (Page 4.)

The plaintiff in error is the receiver appointed by

the Comptroller of the Currency, of the Elmira National Bank, of Elmira, New York, which is a bank organized under the banking laws of the United States. (Page 4.)

Upon May 23d, 1893, said national bank became insolvent, closed its doors and ceased to transact business, and upon the 24th day of May, 1893, the plaintiff in error was appointed its receiver, and as such qualified upon the 2d day of June, 1893, and entered upon his duties. Said receiver is still in possession of all the property of said insolvent national bank as such receiver. (Page 4.)

Upon the said 23d day of May, 1893, the defendant in error had on deposit in the said national bank the sum of $42,704.67. The amount of said deposit did not exceed the amount authorized by the said banking laws of the State of New York to be so deposited. (Page 4.)

The payment of all the circulating notes of the said national bank has been provided for, and the plaintiff in error, as its receiver, has in his possession property of the said insolvent national bank, consisting of money exceeding the amount of $42,704.67, and interest thereon from May 23d, 1893. (Page 4.)

The defendant in error has duly, and upon June 7th, 1893, demanded from the defendant, as such receiver, the payment of the said amount of its deposit and interest thereon from said May 23d, 1893, and that the said deposit be recognized by the said receiver as a preferred claim, under Section 130 of the banking laws of the State of New York (Chapter 689 of the Laws of 1892), and the said demand has been refused. (Pages 4–5.)

First Point. — The court will, if possible, avoid construing the state banking law to be in conflict with the national banking law. It will, if possible, avoid a construction which holds a statute unconstitutional. It will endeavor to reconcile the statutes.

1. An act should be so construed as to bring it, if possible, within the legislative authority. All statutes will be construed in the most beneficial cial way which their language will permit, to prevent hardship or injustice; to favor public convenience, to oppose all prejudice to public interests.

Sutherland on Statutory Construction, paragraph 324, and cases cited.

2. Both the federal and state laws belong to one system, and though emanating from different legislative bodies, they are not hostile nor foreign to each other.

Id. Paragraph 22.

3. The rule that where an act of a state legislature is susceptible of two interpretations, one of which would overthrow the act or make it uncon-

stitutional, and the other will support it and give it effect, the courts will adopt the latter, was followed by the Federal Court in expounding the revenue laws of the state.

8th Circuit (Mo.), 1876.

St. Louis Nat. Bank vs. Papin, 22 Int. Rev. Rec., 343.

4. It is the peculiar province of the Supreme Court of the state to determine the meaning of the statutes of such state, and after such determination courts of the United States will hesitate to place upon such statute a different construction which will bring such statute in conflict with a statute of the United States, and therefore render it void.

Dav. Nat. B'k vs. Mittelbuscher, Circ. Ct., Iowa, 15 Fed. Rep., 225, 1883.

Second Point.— The effect of upholding the contention of the defendant in error will be to increase, not to curtail, the efficiency of the national banks.

1. If this case is reversed, it will result in the

withdrawal of many million dollars of deposits from the national banks of the State of New York alone. The state statute defended is not a discriminating one against national banks. It applies equally to all banks, state and national. Deposits of savings banks are only permitted in national banks because of the preference provided for. If the preference be denied, the right to deposit will be denied, which will be a most serious blow to national banks, a very large proportion of whose deposits consist of moneys due to savings banks. The effort of Congress is to give national banks advantages equal, and even superior to thoseof state banks. The effort of the Court should be so to construe the statutes as to preserve to national banks privileges and advantages at least equal to those enjoyed by state banks. Savings banks, in the state of New York at least, are to a certain extent benevolent or eleemosynary institutions. They are not designed for the personal profit or advantage of their incorporators, trustees or officers. They are designed to encourage economy and thrift among the people, and to afford a secure place for the accumulation of the savings of the mass of the people. They are the creatures of statute, every act of whose officers must be based upon legislative authority; and where and where only they may invest or deposit their funds is regulated by statute. For twenty years the State of New York has permitted her savings banks to deposit their surplus funds in national banks as well as in

state banks, upon the condition that if such depository become insolvent, the amount of such deposits shall be first paid in full after the payment of the circulating notes of the bank has been provided for.

2. From the first passage of this law in 1875 to the present date, it has been the evident intent of the legislature of the State of New York, to make no discrimination between state and national banks, either as to their rights to receive deposits from savings banks or as to the security of such deposits. The legislature has clearly intended to guard the funds of savings banks from loss, by every practicable protection, and their deposits in national banks would not have been permitted except for the security given by the statute. The security of the funds of savings banks is the fundamental and controlling principle of the entire savings bank legislation, and the legislature of the State of New York cannot be deemed to have allowed savings bank deposits in national banks with the intent thereby to lessen their safety and security. All savings bank legislation must be liberally construed. The Comptroller of the Currency of the United States states in his affidavit, filed upon the motion to advance this cause, that at the time this case was argued in the Court of Appeals there were more than eighteen millions of dollars of

savings bank deposits in national banks in the State of New York alone.

3. A decision of this case, adverse to the defendant in error, would compel the withdrawal of every cent of this enormous fund and its deposit in state banks where it would have the benefit of the statute. A national bank then, however strong, would get none of these deposits, and the savings banks would be deprived of the privilege of selecting national banks as their depositories. The narrow construction of the federal statute contended for by the plaintiff in error would be equally damaging to both national banks and savings banks; would discriminate strongly against national banks in favor of state banks, and would be contrary to the policy of recent legislation which has been to place national and state banks upon an equal footing. The consequences of a decision adverse to the defendant in error would affect disastrously depositors in the savings banks, largely a class composed of the weak and defenseless, whose rights have always been jealously guarded by the state and for whose protection every possible safeguard has been provided by the legislature.

4. Under the beneficial effect of the statute of the State of New York, this vast sum of money mentioned, has been gradually accu-

mulated and deposited in national banks, money which belongs to the many thousand depositors of the various savings banks of the state, in small sums to each, and the aggregate amount of these savings of the poor, form a very considerable proportion of the total deposits of the national banks. The grave public consequences to be apprehended from the sudden withdrawal from national banks of this enormous sum, should not be lightly regarded by the Court. In these days of financial disturbances, largely caused by lack of confidence in banks, a decision involving such far-reaching consequences, and changing so radically the existing condition of affairs, will, if possible, be avoided by the Court.

Third Point. — The statute of the State of New York giving to its savings banks the right to have their deposits in other banks which may become insolvent, first paid in full, after the payment of the circulating notes of such banks have been provided for, assumes to control national as well as state banks.

The full text of the sections of the banking law of the State of New York here involved, are as follows :

"§ 118. *Available fund for current ex-*
"*penses; how loaned.* — The trustees of every
"such corporation shall as soon as practicable in-
"vest the moneys deposited with them in the se-
"curities authorized by this article; but for the
"purpose of meeting current payments and ex-
"penses in excess of the receipts, there may be
"kept an available fund, not exceeding ten per
"centum of the whole amount of deposits with
"such corporation, on hand or deposit in any
"bank in this state organized under any law of
"this state or of the United States, or with any
"trust company incorporated by any law of the
"state; but the sum so deposited in any one
"bank or trust company shall not exceed twenty-
"five per centum of the paid-up capital and sur-
"plus of any such bank or company; or such
"available fund, or any part thereof, may be
"loaned, upon pledge of the securities or any of
"them named in sub-divisions one, two, three and
"four of the preceding section but one, but not in
"excess of ninety per centum of the cash market
"value of such securities so pledged. Should
"any of the securities so held in pledge depre-
"ciate in value, after making any loan thereon,
"the trustees shall require the immediate pay-
"ment of such loan or of a part thereof, or addi-
"tional security therefor, so that the amount
"loaned shall at no time exceed ninety per cen-
"tum of the market value of the securities
"pledged for the same."

"§ 119. *Temporary deposits.* — Every such
"corporation may also deposit temporarily in the
"bank or trust companies specified in the last

"section the excess of current daily receipts over "the payments, until such time as the same can "be judiciously invested in the securities required "by this article. Whenever it shall appear to "the superintendent of banks that the trustees of "any such corporation are violating the spirit "and intent of this provision, by keeping per- "manently uninvested all or an undue proportion "of the moneys received by them, he shall report "the facts to the Attorney General, who shall "proceed against such corporation in the manner "provided in section eighty-two of this chapter."

"§ 130. *Debts due savings banks from insol- "vent banks preferred.*—All the property of any "bank or trust company which shall become in- "solvent, shall, after providing for the payment "of its circulating notes, if it has any, be applied "by the trustees, assignees or receiver thereof, in "the first place, to the payment in full of any sum "or sums of money deposited therewith by any "savings bank, but not to an amount exceeding "that authorized to be so deposited by the provis- "ions of this chapter, and subject to any other "preference provided for in the charter of any "trust company."

Sections 118 and 119 of the New York State banking law quoted, are the substitutes for Sections 261 and 262 of Chapter 409 of the Laws of 1892, which were themselves substitutes for Sections 27 and 28 of Chapter 371 of the Laws of 1875, all of which authorize de-

posits to be made by savings banks, in either state or national banks, the law having been continued as to that point, without change by both of the banking law revisions of 1882 and 1892.

Section 130 of the present banking law above quoted as to preference of savings banks, is a substitute for Section 282 of Chapter 409 of the Laws of 1882, which was itself a substitute for Section 48 of Chapter 371 of the Laws of 1875.

The language of Section 48 of the Act of 1875, and of Section 282 of the Act of 1882, being precisely alike as to this point, was as follows: "All the assets of any bank or banking "association now or hereafter organized, that "shall become insolvent, shall, &c."

The corresponding language of Section 130 of the Banking Law of 1892 is, "All the prop- "erty of any bank or trust company which shall "become insolvent, &c., —"

The term "bank" is defined by section 2 of the Banking Law of 1892 so as to include all that could be included by the term "banking associations," and then in accordance with the general system of the statutory revision now in progress in the State of New York, the single term so defined is thereafter used.

No change in the substance of the law will therefore be deemed to have been intended by the omission of the term "banking associations," and none can be deemed to have been intended by omitting the terms "now or hereafter organized."

These three sections, 118, 119 and 130 of the banking law, must therefore be held to make no change in the substance of the law upon this point, as it has stood since the act of 1875.

That this statute applies to national as well as state banks, there can be no question.

1. Because the Court of Appeals, the court of last resort in the State of New York, has so held, affirming in all respects the General Term, and this Court will adopt its construction.

   See opinion of Mr. Justice Merwin, (page 10.)

   And opinion of Judge Gray, (pages 18 and 19.)

It is claimed by the defendant in error that this construction of the New York State banking law placed upon it by its own Courts, is final ; and must, according to the established principles of this Court, be accepted as its true interpretation.

Mr. Justice Field in his opinion in the case of Christy vs. Pridgeon, 4 Wall., 196, enunciates this doctrine with great distinctness on page 203, and quotes with approval the opinion of Mr. Justice Johnson in the case of *Shelby vs.*

Guy, 11 Wheaton 367, as follows: "Nor is it "questionable that a fixed and received con- "struction of their respective statute laws in "their own courts, makes, in fact, a part of "the statute law of the country, however we "may doubt the propriety of that construc- "tion." In the same opinion Mr. Justice Field uses this language: "The interpretation "within the jurisdiction of one state becomes a "part of the law of that state as much as if it "were incorporated into the body of it by the "legislature. If, therefore, different interpre- "tations are given indifferent states to a simi- "lar local law, that law in effect becomes by "the interpretations, so far as it is a rule for "our action, a different law in one state from "what it is in the other."

The same doctrine is asserted in the case of the People vs. Weaver, 100 U. S., page 539, where, upon page 541, Mr. Justice Miller in his opinion, speaking as to the construction of the statute of the State of New York, placed upon it by the Court of Appeals of that State, says: "Of the second of these propositions, this "Court has no jurisdiction, but must accept the "decision of the highest court of the state, ". . . . In that respect, weare bound by "the decision of the Court of Appeals as to "the true construcion of the state statute."

2. The plaintiff in error did not dispute the soundness of this construction when before the

state courts, and in his third assignment of error concedes it. (Pages 15–16.)

3. The whole statute shows such intention beyond question.

Clearly the legislature intended that national banks should be on the same footing as state banks as to right to receive deposits of savings banks.

But this intention would wholly fail of purpose, if such deposits were preferred when held by insolvent state banks and were not preferred when held by insolvent national banks.

Fourth Point.— The said Section 130 of the banking law of the State of New York, affording the security here contended for to the deposits of savings banks in national banks, is within the proper sphere of state legislation.

1. The theory upon which the constitutionality of national bank legislation by Congress was

finally upheld, is a narrow one, necessarily involving sharp and closely confined limitations. Of the cases on this subject, the leading one is *National Bank vs. Commonwealth*, 9 Wall., 353. From the opinion in that case, the United States Supreme Court, in so recent a case as West. Union Tel. Co. v. Mass., 125 U. S., 530, at p. 551, referring to such limitation, quotes approvingly as follows:

"That limitation is that the agencies of the "federal goverment are only exempted from "state legislation, so far as that legislation may "interfere with or impair their efficiency in "performing the functions by which they are "designed to serve that government. Any "other rule would convert a principle founded "alone in the necessity of securing to the govern- "ment of the United States the means of exer- "cising its legitimate powers, into an unauthor- "ized and unjustifiable invasion of the rights "of the state . . . . So of the banks. "They are subject to the laws of the state, and "are governed in their daily course of business "far more by the laws of the state than of the "nation. All their contracts are governed "and construed by state laws. Their acqui- "sition and transfer of property, their right "to collect their debts, and their liability to "be sued for debts, are all based on state law. "*It is only when the state law incapacitates the* "*banks from discharging their duties to the* "*government that it becomes unconstitutional.*"

The same doctrine is referred to approvingly in Waite v. Dowley, 94 U. S., 527, in which at p. 533, the Court, per Mr. Justice Miller, says:

"We have more than once held in this Court "that the national banks organized under the "acts of Congress are subject to state legisla- "tion, except where such legislation is in con- "flict with some act of Congress, or when it "tends to impair or destroy the utility of such "banks as agents or instrumentalities of the "United States, or interferes with the purposes "of their creation. This doctrine was clearly "and distinctly announced in National Bank v. "Commonwealth, 9 Wall., 353; and that case "has been often referred to since, with approval, "in this Court."

It is important to note that each of the three cases last above cited were tax cases, the sphere in which the constitutionality of national legislation as supreme over the states is the most clear, and has been most rigorously asserted. The same rule is followed in Thomas v. Farmers' Bank, 46 Maryland, 43, where, at p. 53, the Court quotes, with approval from National Bank v. Commonwealth, 9 Wall., 353, the same paragraph from that opinion quoted in the case above cited in 125 U. S.

Nor is this position affected by the decision given in the Farmers' & Mechanics' National Bank v. Dearing, 91 U. S., 29, which, although using broader language in one portion of the

opinion than was necessary for the decision, is, nevertheless not inconsistent with the doctrine held in National Bank v. Commonwealth before cited, so frequently referred to, or if it be construed as inconsistent therewith, it must be deemed overruled by the later approvals by this Court of that doctrine contained in the cases above cited, from the 94th and 125th U. S. Supreme Court and other recent cases.

In Winter v. Baldwin, 89 Ala., 483, (S. C. 7, So. 734,) the doctrine of National Bank v. Commonwealth, 9 Wall., 353, and of Waite v. Dowley, 94 U. S., 527, is quoted approvingly, and the Alabama Supreme Court accordingly holds that a state statute giving to stockholders in corporations generally, without specifying national banks, the right to inspect the books of the incorporation, gives the right of a stockholder of a national bank to inspect its books, for the reason that such right does not tend to impair or destroy the utility of such banks as fiscal agents of the federal government nor interfere with the purpose for which national banks were created.

See also:

Witters v. Sowles, 32 Fed. Rep., 762.

2. The contract which the state statute compelled the national bank to make with the defendant

in error in this case is one made in respect to an ordinary transaction between the bank and a depositor. Such a contract in no respect impairs the utility of the national bank as an agent of the United States.

It was distinctly so held by the Courts below (pp. 11 and 19).

Fifth Point —This statute of New York which we are here considering, which gives security to the deposits of savings banks in national banks, must be deemed as embodied in and to form a part of the contract made between the savings bank and the national bank at the time when the deposit was made, and if valid, constitutes an equitable lien upon, or an equitable assignment of the assets of the national bank upon insolvency, so far as necessary to pay this debt.

1. A contract made is deemed in law to be made in reference to and conditioned by existing law which forms a part of the contract the same as if fully set forth therein.

Contracts made within a state where an insolvent law exists between citizens of that state, are to be considered as made in reference to the law and are subject to its provisions.

Cooley's Constitutional Limitations, 3rd Edition, par. 294.
Citing Ogden v. Saunders, 12 Wheaton, 213.
Baldwin v. Hale, 1 Wall., 223.

The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms.

Von Hoffman vs. Quincey, 4 Wall., 535 at page 550.
2 Story on the Constitution, Paragraph 1385.

The Court of Appeals of the State of New York and the General Term of the Supreme Court have both decided that the statute became a part of the contract made between the parties at the time of the deposit, (pp. 13 and 18); and the construction thus placed upon the statute by the state courts is conclusive upon this court.

2. This contract of which the statute formed a part, gave to the defendant in error an equitable lien upon or operated as an equitable assignment of the assets of the national bank upon insolvency for the purpose of securing the payment of the deposit in full.

a. It has been so construed by the Court of Appeals in New York, which construction binds this Court.

As stated by Judge Merwin, "The receiver "took, subject to any valid liens or equities. "The bank that he represents received the "deposits subject to the condition imposed by "the state statute, and whether it be said that "a trust was impressed or a lien imposed, the stat- "ute bound the bank and its assets when they "passed to the receiver and interfered with no "rights of the government." (Page 13.)

As stated by Judge Gray: "In the present "case, while a going concern, it (the Elmira Na- "tional Bank) entered into an engagement with "the savings bank which the state law required "and regulated; which vested in the latter su- "perior rights or equities, and which, in the pos- "sible event of future insolvency, would give it "a prior claim to payment from the assets." (Page 19.)

In Louisiana v. Pillsbury, 105 U. S., 278 at p. 294, this court speaking by Mr. Justice Field, says: "Whether such a construction (by "judicial decision upon a clause of the state con- "stitution) was a sound one is not an open ques- "tion. . . . The exposition given by the "highest tribunal of the state must be taken as "correct so far as contracts made under the act "are concerned. . . . The construction, so "far as contract obligations incurred under it are "concerned, constitutes a part of the law as much "as if embodied in it."

The foregoing was cited with approval by Mr. Justice Shiras in Morley v. Lake Shore & Mich. So. Railway Company, decided November 14th, 1892, reported in 146 U. S. Rep., 162, at page 166.

Further in this opinion Mr. Justice Shiras cites the Provident Inst. v. Mass., 6 Wall., 611, 630, as to the rule of construction adopted by the highest court of the state being regarded as conclusive in this court. Also from Leffingwell v. Warren, 2 Black, 599, 603. "The con- "struction given to a statute of the state by the "highest tribunal of such state, is regarded as a "part of the statute, and is as binding upon the "courts of the United States as the text." And further citing Randall v. Brigham 7 Wall., 533–541, as holding that the meaning of a state statute, declared by the highest court of a state, is conclusive upon this court.

b. That this contract thus made is an equitable assignment, and that such equitable assignments are given full force by Courts of Equity, there is abundant authority both in the courts of this country and in those of England. Such equitable assignments may be made of funds or property to be thereafter acquired. In equity, assignments of possibilities, expectancies, things not *in esse*, &c., will be protected and enforced.

Bisph. Eq., Par. 164.

It is not material in contemplation of equity that the fund assigned should be in existence.

Peugh v. Porter & ano., 112 U. S., 737, at p. 742.

Equity enforces assignments of property to be acquired thereafter and this right is not merely in the nature of a right to the specific performance of executory contracts, or is to be measured by the limitations by which that equitable remedy is controlled. The assignee's right is a *present title* not existent at law, but thoroughly recognized in equity.

Bisph. Eq., Par. 165, citing Tailby v. Off. Rec. 13, App. Cas., 531.

This case, Tailby v. Off. Rec., which passed through all the courts of England and was finally decided by the House of Lords, July

30th, 1888, is interesting because the right of the assignee under the equitable assignment was called in question by an official receiver in bankruptcy who occupied a similar position to that of the plaintiff in error in this case. One Izon assigned to one Tyrell, as security for a loan then made, all book debts due and owing, or which might become due and owing thereafter during the life of the loan. Tyrell having died November 1884, his executors assigned to one Tailby, among other debts, a debt of eleven pounds which had become due Izon since the assignment, from Wilson Bros. & Co. In December 1884, Izon became bankrupt. In January 1885, and after the adjudication in bankruptcy, Wilson Bros. & Co. paid Tailby the said eleven pounds. Izon's official receiver in bankruptcy sued Tailby thereupon for the amount, as money had and received. It was held that the assignment of future book debts though not limited to debts in any particular business passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the assignor at the time of the assignment or in any other business.

Lord Herschel, in speaking of the limitation of this doctrine to the class of cases in which a Court of Equity would decree specific performance, said, speaking of the opinion of Lord Westbury, in Holroyd vs. Marshall, 10 H. L. Cas., 191, decided July 25th, 1862: "Now, "whatever the learned Lord meant by limiting

". . . . he certainly did not intend to ex-
"clude cases in which the after acquired property
"fell within general descriptive words used in the
"deed." And in this case the final judgment of the House of Lords gave to Tailby the right under the equitable assignment which came to him through Tyrell, to retain the fund paid him by Wilson Bros. & Co., as against the official receiver of Izon, the original assignor.

The assignee has an equitable title from the time of the assignment.

Bisph. Eq., 165, citing Holroyd v. Marshall, supra.

Equity looks upon things agreed to be done as actually performed. An agreement based upon a valuable consideration to give a mortgage, would be treated in equity as a mortgage. This doctrine was declared by Judge Gilbert in the case of Burdick, assignee, v. Jackson, 4 Nat. Bank'cy Reg., Rep. 318, (S. C., 7 Hun, 488,) to have been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land. And this was where a mortgage was executed by a bankrupt just before the petition in bankruptcy was filed, but was given in pursuance of a parol agreement between the bankrupt and the defendants more than fifteen months before.

Held that the execution of the mortgage gave the defendants a lien which took effect by relation as against the bankrupt, and purchasers from him with notice, at the time the agreement to give it was made. The assignee in bankruptcy not being a *bona fide* purchaser took the transfer subject to the lien.

A sale, assignment, or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the articles in the purchaser or mortgagee, as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either ; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee.

3 Pomeroy Eq. J., Par. 1288.

The doctrine of equitable assignments of property to be acquired in the future is much broader than the jurisdiction to compel the specific performance of contracts. Although a sale or assignment of property to be acquired in the future does not operate as an immediate alienation at law, it does operate as an equitable assignment of the *present possibility* which changes into an assignment of the *equitable*

ownership as soon as the property is acquired by the vendor.

Id., Par. 1288.

According to the general doctrine of equity, established beyond any doubt by the highest judicial authority, the equitable assignment or the equitable lien upon property to be acquired in the future, is valid and enforceable not only against the contracting party himself, but also against subsequent judgment creditors, assignees in bankruptcy, and all other *volunteers* claiming or holding under him and against subsequent purchasers from him with notice of the assignment or lien. When chattels are sold or exchanged, the lien will attach to those substituted.

3 Pom. Eq. J., Par. 1291.

A valid equitable assignment, if it be clearly proved, may be made verbally.

2 White & Tudors Lead. Cas. Eq., 843.

If a man contracts to assign property which is to come into existence in the future, then when it has come into existence, equity, treating as done that which ought to be done, fastens upon

that property and the contract to assign thus becomes a complete assignment.

Id., 847. Citing Collyer v. Isaacs, 19 Ch. Div., 357.

Notice even is not necessary as against third parties who stand in the same position as the assignor, as for instance, persons claiming under a subsequent assignment as *volunteers*.

Id., 848.

Assignees in bankruptcy take only such rights as the bankrupt had, and are affected with all the equities which would affect the bankrupt himself. Courts of equity support assignments of choses in action, interests and expectations not only, but also of things which have no present actual potential existence but rest in mere possibility only.

Where money was loaned and mortgage was given on all tools, machinery, stock, &c., which the mortgagor might acquire, which might be brought into the plant during the continuation of the mortgage, it was held that the title of the mortgagee was better than that of the assignee in bankruptcy who was not a purchaser for value.

Mitchell v. Winslow, U. S. Cir. Ct., 1st Circuit, Oct. 1843. 2 Story, 630, Opin. by Story, J.

An agreement to charge, or to assign, or to give security upon, or to affect property not yet in existence, or in the ownership of the party making the contract, or property to be acquired by him in the future . . . . constitutes an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of contract.

3 Pom. Eq. J., 1236, 1237.

The case of Hunt & ano., assignees in bankruptcy of Gilbert et al., v. Mortimer et al., 10 B. & C., 44, strongly illustrates this doctrine of an equitable assignment of a fund not yet acquired by the assignor, and that the interest of the assignee therein must stand as against the assignees in bankruptcy, when the assignment was made for a consideration of value passing at the time, even though the assignor was on the verge of bankruptcy.

W. D. & T. Gilbert, mathematical instrument makers, in May, 1827, had an order from the East India Company, and being in want of funds, applied to the defendants, who knew them to be insolvent (or in considerable difficulties). They advanced part of it and prevailed upon two friends to advance five hundred pounds each, upon condition that they, the defendants, should receive from the East India Company the money which should afterwards be due the bankrupts

(Gilberts), and repay themselves and their friends the advances. The order was executed and the money became due November 29th, 1827, when it was received by the defendants and so applied. Before then, the bankrupts had been several times arrested and bailed by the defendants, and there was some evidence of an act of bankruptcy having been committed before the money was paid by the East India Company. Upon an act of bankruptcy stated to have been committed in December 1827, a commission in bankruptcy was issued in March 1828. Hunt and another, the assignees in bankruptcy, sued Mortimer et al., to recover this money on the ground that its payment constituted a fraudulent preference under the bankrupt act. At the trial a verdict was rendered for the defendants under instructions from the Court. On a motion for a new trial, Judge Littledale said: "To constitute a fraudulent preference two "things must concur; first, insolvency in the "trader, and secondly, a *voluntary* payment or "transfer by him. This payment was not "voluntary but the subject of a special con- "tract made before the money was lent. The "reason of the rule is, that all the creditors "who have trusted to the general credit of the "bankrupt should share his property equally. "Here the defendants were no gainers by the "transaction. They lent the money knowing "Gilberts' insolvency, and but for the peculiar "bargain for re-payment would never have ad- "vanced it. In that event the fund from the "company would never have been obtained so

"that the general creditors are not in any de-
"gree injured. It seems to me therefore that
"the direction was right."

In the same case, on the motion for a new trial, Park, J. said: "There is no pretense for "calling this a fraudulent preference. The "money was not lent by the defendants on the "general credit of the bankrupts, but on the "faith of the moneys which were to be received "from the East India Company, and the ar-"rangement between the bankrupt and the de-"fendant, had the effect of an *equitable assign-"ment* of that particular fund to which the "plaintiffs' (who, as assignees, are entitled only "to such effects as the bankrupt had *both legally "and equitably*), have no claim."

In the case at bar, even should it be held that the receiver of the national bank was entitled to notice of the equitable assignment, which is not conceded, the statute gave him and all other persons full notice.

The assignment of a part of a fund not yet in existence, for good consideration, is enforceable in equity against an assignee in insolvency.

James vs. Newton, 142 Mass., 336.

3. This equitable assignment only differs from a pledge in that the fund is not yet definitely fixed. Such a pledge or mortgage is permitted when made for present consideration, though it may operate to give a preference. So the *present assignment* of a fund to be thereafter definitely ascertained, must be permitted, though it operate as a preference.

4. This constitutes a present right of property which the legislature cannot constitutionally impair.

Mather & Strong v. Bush, 16 Johns. Rep., 232 at page 252.
Roosevelt v. Cebra, 17 Johns. Rep., 108.
Sturges v. Crowninshield, 4 Wheaton, 122, at p. 198.

Any statute is unconstitutional as impairing the obligation of contracts which introduces a change into the express terms of the contract, its legal construction, its validity, its discharge, or (within certain limits) its enforcement.

Black on Constitutional Prohibitions, Paragraph 102.
2 Story on The Constitution, Paragraph 1385.

The extent of the change is immaterial. Any deviation from the terms of the contract impairs its obligation.

Green vs. Biddle, 8 Wheaton, 1.

The Constitution of the United States forbidding a state from passing any law impairing the obligation of contracts, was held to apply to all contracts executed and *executory*, whoever may be the parties to them.

Opinion of Mr. Justice Swayne in Von Hoffman vs. Quincey, 4 Wall., 535, at page 549, citing Fletcher vs. Peck, 6 Cranch, 87.

The prohibition of the constitution embraces *equitable rights* and all contracts executed or executory between private individuals, or a state and individuals, or corporations, or between the states themselves.

Green vs. Biddle *supra*, (8 Wheaton, 1).

The prohibition of the constitution against state laws impairing the obligation of contracts, applies to implied as well as to express contracts.

Fisk v. Jefferson Police Jury, 116 U. S., 131.

In any case the lawful repeal of a statute cannot constitutionally be made so as to destroy contracts which have been entered into under it, or to affect substantially the rights obtained by virtue of the statute.

Cooley's Constitutional Limitations, 3rd Edition, pages 289, 290, 291 and 292.

5. The right of the savings bank to deposit in the national bank only existed by permission of the statute. That permission is conditioned on an equitable assignment, as collateral security for the deposit, of the assets of the national bank on hand at the time of its insolvency.

Sixth Point. — The contract made by the operation of the state statute between the savings bank and the national bank at the time the deposit was made, constituting an equitable lien or equitable assignment, is not in conflict with the national bank act, or with any provision of any federal statute.

The following are the provisions of the national banking law involved: Revised statutes

of the United States, Title, LXXII., National Banks, Chap. 4.

"§ 5236. From time to time, after full provision has been made for refunding to the "United States any deficiency in redeeming the "notes of such association, the comptroller "shall make a ratable dividend of the money "so paid over to him by such receiver on all "such claims as may have been proved to his "satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the "assets of such association are paid over to him, "shall make further dividends on all claims "previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid "over to the shareholders of such association, "or their legal representatives, in proportion to "the stock by them respectively held."

"§ 5242. All transfer of the notes, bonds, "bills of exchange, or other evidences of debt "owing to any national banking association, or "of deposits to its credit; all assignments of "mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of "money, bullion or other valuable thing for its "use, or for the use of any of its shareholders "or creditors; and all payments of money to "either, made after the commission of an act "of insolvency, or in contemplation thereof, "made with a view to prevent the application "of its assets in the manner prescribed by this "chapter, or with a view to the preference of "one creditor to another, except in payment of

"its circulating notes, shall be utterly null and "void, and no attachment, injunction or execu- "tion shall be issued against such association "or its property before final judgment in any "suit, action, or proceeding, in any state, "county, or municipal court."

a. The word "ratable" or "pro-rata," is defined by Bouvier, "according to the right, "proportion, or allowance. A creditor of an in- "solvent estate is to be paid *pro-rata* with cred- "itors of the *same class*."

b. The non-preferential portions of the federal banking act are not construed more strictly by the courts than the similar but more stringent non-preferential provisions of the former national bankruptcy act. For example, the word "insolvency" as used in the bank act means the same as when used in the bankruptcy act.

Case v. Citizens Bank, 2 Woods, 23.

c. The preference forbidden by the national bank act is confined exclusively to the preference made to secure or pay *antecedent* debts. Mr. Justice Davis, in Tiffany v. Boatman's Inst., 18 Wall., 375, in pronouncing the opinion of this court said, at page 388, speaking of a bank-

rupt and a case in bankruptcy: "In the nature "of things he cannot borrow money without "giving security for its repayment, and this "security is usually in the shape of collaterals. "Neither the terms nor policy of the bankrupt "act are violated if these collaterals be taken "*at the time the debt is incurred.* His estate is "not impaired or diminished in consequence as "he gets a present equivalent for the securities "he pledges for the repayment of the money "borrowed. Nor in doing this does he prefer "one creditor over another, which is one of the "great objects of the bankrupt law to prevent. "*The preference at which this law is directed* "*can only arise in case of an antecedent debt.*"

d. "The term 'insolvency' is defined to be "a state of inability to pay debts in the ordi- "nary course of business, and in the way in "which debts are ordinarily paid."

Blumensteil, L. & P., Bk'cy, p. 583.

e. "Contemplation of insolvency" means contemplation of a bad existing state of affairs on the part of the debtor from which insolvency is to be reasonably inferred to be the probable outcome.

The term "in contemplation of insolvency,"

or "in contemplation of an act of insolvency" means the contemplation of the commission of the act which is declared by the bankrupt law to be an act of bankruptcy.

Re Goldschmidt, 3 Nat. Bank'cy Reg. Rep., 169.

"The contemplation" mentioned means from a view of the state of things which surrounded the debtor, he believed he would not be, and continued to be from that time henceforth, able to pay his debts as such debts should mature in the ordinary course of business.

In re Dibblee, 2 Nat. B'k'y Reg. Rep., 625.

The words "in contemplation of bankruptcy" as used in the national bankrupt act of 1867, mean in contemplation of committing what was made by the act an act of bankruptcy or voluntarily applying to be decreed a bankrupt.

In the matter of Craft, 2 Benedict, 221.

f. "With a view to the preference" means the intent which exists in the mind of the debtor when the preferential contract is enforced, and not the intent which existed in the mind of the debtor at the time when the contract giving

the preference was made as security for present consideration.

Piper v. Baldy, 10 Nat. Bank Reg. Rep., 517, at pages 519 and 521. Opinion by Strong, J.

Clark v. Iselin, 21 Wall, 360.

1. The Federal statute has been construed to recognize all prior equitable and legal liens.

The clauses of sections 5,236 and 5,242, U. S. R. S., abovequoted, requiring the comptroller to make ratable dividends and prohibiting preferences, came in question in the line of conflicting decisions in state and federal courts as to the right of equitable set-off by a debtor to a bank, of his claims against the bank, such right being denied in some of the cases, upon the ground that to allow such set-off would be, in effect, to give a preference and to defeat the requirement of ratable dividends. This conflict has finally been settled by the decision of this court in the case of Scott v. Armstrong (December, 1892) 146 U. S., 499.

Mr. Chief Justice Fuller says:

"The argument is that these sections by im-
"plication forbid this set-off, because they re-
"quire that, after the redemption of the cir-
"culating notes has been fully provided for, the
"assets shall be ratably distributed among the

"creditors, and that no preferences given, or "suffered, in contemplation of or after com- "mitting the act of insolvency shall stand. "And it is insisted that the assets of the bank ex- "isting at the time of the act of insolvency, in- "clude all of its property, without regard to "any existing liens thereon or set-offs thereto. "We do not regard this position as tenable. "Undoubtedly any disposition by a national "bank, being insolvent or in contemplation of "insolvency, of its choses in action, securities "or other assets, made to prevent their applica- "tion to the payment of its circulating notes, "or to prefer one creditor to another, is forbid- "den; *but liens, equities, or rights arising by ex- "press agreement, or implied from the nature of "the dealings between the parties, or by opera- "tion of law, prior to insolvency and not in con- "templation thereof, are not invalidated. The "provisions of the act are not directed against "all liens, securities, pledges or equities, whereby "one creditor may obtain a greater payment than "another, but against those given or arising "after or in contemplation of insolvency.* Where "a set-off is otherwise valid, it is not perceived "how its allowance can be considered a prefer- "ence, and it is clear that it is only the balance, "if any, after the set-off is deducted which can "justly be held to form part of the assets of the "insolvent. The requirement as to ratable "dividends, is to make them from what belongs "to the bank, and that which at the time of the "insolvency belongs of right to the debtor, does "not belong to the bank."

The Courts below have held that the right asserted by the defendant in error in this case is one of the "rights arising by express agreement, "or implied from the nature of the dealings be- "tween the parties or by operation of law, prior "to insolvency," described by Mr. Chief Justice Fuller in the Scott case.

See opinion of General Term at page 13, opinion of Court of Appeal at page 19.

It has been uniformly held that the receiver is a statutory assignee of the bank, and gets no better title than the bank had, and takes the funds in the plight in which they were held by the bank immediately prior to his appointment, and must turn them over accordingly unaffected by the provisions of the national bank act, as to ratable distribution. He takes the property *cum onere*.

Trust funds received by an insolvent national bank may be followed into the hands of a receiver and taken from him when the identical funds received have become mingled with other funds of the bank and their identity lost.

Massey v. Fisher, 62 Fed. Rep., 958, May 4, 1894.

See also:

Bank v. Weams, 6 So. West. Rep., 802, Texas Sup. Ct.

In Casey, Receiver, v. La Societe de Credit Mobilier, 2 Woods, 77; (S. C. 1 Nat. Bank Cases, 285), it was held that the preference of one creditor of a national bank, mentioned in Section 5242 of the U. S. revised statutes, is a preference given to the creditor to secure or pay a *pre-existing debt;* that when a national bank received a loan on condition that the lender shall be secured therefor, and security is accordingly given by pledging a part of the assets of a bank, this is not a preference within the meaning of Section 5242, although the bank is in an embarrassed state; that the fact that the assets pledged were changed, from time to time as they fell due, and others substituted in their stead, according to the contract between the bank and the pledgee did not make the pledge of the substituted assets void; that the title of the receiver is the same as that of an assignee in bankruptcy, and is subject to all equities.

See also:

Corn. Exch. Bank v. Blye, 101 N. Y., 303.

1st Nat. Bank v. Dunbar, 118 Ill., 625.

Hade v. Mc Vey, 31 Ohio St., 231, at p. 238.

In Bell v. Hanover National Bank, 57 Fed. Rep., 821, (Circ. Ct., Sept., 1893,) it was held that where a national bank had long prior to the commission of the act of insolvency pledged collateral with a correspondent to secure payment of loans, neither the subsequent insolvency of the bank nor the appointment of a receiver destroyed the lien of the correspondent or its right to dispose of the pledge.

In Scott v. Armstrong cited before, this court held that the receiver of a national bank took the assets as a mere trustee and not as a purchaser for value. That in the absence of a statute to the contrary, demands and choses in action which belonged to the bank were in his hands subject to all claims and advances that might have been interposed as against the bank before the liens of the United States and general creditors attached.

In so recent a case as Chemical National Bank v. Armstrong, 59 Fed. Rep., 372 (Circ. Ct. of App., Nov. 1893,) Judge Taft, in his opinion, uses this language: "The national bank act "was framed to secure equality of distribution "among the creditors, *so far as is consistent with* "*the previous contract rights of those creditors.* "If one creditor secured collateral for his loan

"when made, that produced an inequality be-
"tween him and the other creditors who have
"no collateral, which it cannot have been the
"purpose of the banking act in its provisions
"for winding up the insolvent bank, to modify,
"reduce, or defeat."

A clearing house may hold as a pledge property received by it under an arrangement with a national bank which afterwards becomes insolvent. It was there held that the receiver takes the assets subject to all equities.

Philler v. Yardley, 62 Fed. Rep., 645. (Circ. Ct. of App., 3rd Circ. July 12, 1894.)

A national bank may pledge its assests and, when insolvent, its receiver takes the property encumbered with all liens placed upon it before failure.

Fisher v. Continental Nat. Bank, 64 Fed. Rep., 708. Circ. Ct. of App., 2d Circ., Dec. 3rd, 1894.

Even under the stringent provisions of non-preferential bankrupt laws, it has been uniformly held that collateral given at the time of the

passing of a present sufficient consideration even though the possibility, or even probability, of future insolvency was in the minds of the parties at the time, will be sustained, and contractual rights or equities existing at such a time will be afterward upheld when insolvency occurs.

Hunt et al., Assignee of Gilbert, v. Mortimer et al., 10 B. & C., 44, *supra.*

Where the insolvent debtor in good faith makes a transfer for value given at the time or in pursuance of an agreement made when the consideration passed, such conveyance will not be an act of bankruptcy.

Blumensteil L. & P. in Bk'cy, p. 96.

Where a payment or transfer is made in pursuance of a prior agreement or understanding made in good faith at the time of creating the debt, it will not constitute a preference although executed just before bankruptcy proceedings.

Id., 590.

In the case of Clark v. Iselin, 21 Wall., 360, a debtor, who afterwards became bankrupt, gave to his creditor a confession of judgment

for present consideration, which put it in the power of the creditor to enter up judgment at any time thereafter and seize the property of the debtor. The judgment was entered and the levy made after the creditor knew that the debtor was insolvent, but the transaction was sustained as against the assignee in bankruptcy. Mr. Justice Strong, in his opinion, says: "That this transaction thus far was perfectly legitimate can hardly be doubted, and so it was regarded by the court below. The bankrupts acquired property by it to the full value of the security they gave. They parted with nothing that they then had. If the defendants had known that they were insolvent at the time it would have made no difference. The confession of judgment was not given for a pre-existing debt. . . . Whether it was or was not (a preference) obviously depends upon the answer which must be given to the question 'was it a transfer of property for a sufficient present consideration, or was it a transfer to satisfy or secure an antecedent debt or liability?' The confession of judgment given on the 25th of February was, as we have seen, a security to the defendants for a loan then made, not a security for a pre-existing debt. Giving and receiving that paper therefore cannot be considered a preference of creditors. The defendants had a clear right to take and to hold it and the borrower had a clear right to give it. Besides, as already remarked, it does not appear from the evidence that at that time Dibblee & Co.,

"were insolvent. It must, therefore, be con-
"cluded as it was by the court below, that there
"was nothing in that transaction which was
"fraudulent in fact or fraudulent as against the
"bankrupt law. The confession was not itself
"a judgment but it authorized the defendants
"to cause a judgment to be entered without the
"knowledge of the debtors and even against
"their protest. Was, then, the subsequent en-
"try of the judgment and the issuing of an
"execution thereon followed by a levy on the
"debtors goods, obtaining an unlawful prefer-
"ence? The court below thought it was, but
"such is not our opinion. It must be con-
"ceded that on the 30th day of April, when the
"defendants caused the judgment to be entered,
"the execution to issue and the levy to be
"made, they knew that Dibblee & Co.,
"were insolvent. But that knowledge
"is not of itself sufficient to invali-
"date the judgment and execution. A
"creditor may pursue his insolvent debtor to
"judgment and execution with full knowledge
"of the insolvency, notwithstanding the pro-
"visions of the bankrupt act, provided the
"debtor does nothing to aid the pursuit. If
"there be no collusion between the debtor and
"the creditor, the ordinary remedies of law are
"open to the latter . . . . The debtor
"must be insolvent or contemplating insolvency
"*when* the alleged preference is given, and he
"must *then* have in view giving a preference
". . . . Now, in case where a creditor,
"holding a confession of judgment, perfectly

"lawful when it was given, causes the judg-
"ment to be entered of record, how can it be
"said the debtor procures the entry at the time
"it is made? It is true that judgment is en-
"tered by virtue of his authority, an author-
"ity given when the confession was signed.
"That may have been years before, or, if not,
"it may have been when the debtor was per-
"fectly solvent, but no consent is given when
"the entry is made, when the confession be-
"comes an actual judgment, and when the
"preference, if it be a preference, is obtained.
"The debtor has nothing to do with the entry.
"As to that he is entirely passive . . . .
"But how can a debtor be said to intend a
"wrongful preference at the time a judgment is
"obtained against him when he knows noth-
"ing of the judgment? That years before he
"may have contemplated the possibility that,
"thereafter, a judgment might be obtained
"against him; that long before he may have
"given a warrant of attorney to confess a judg-
"ment, or by a written confession, as in this
"case, have put it into the power of his cred-
"itor to cause the judgment to be entered
"without his knowledge or subsequent assent,
"is wholly impertinent to the inquiry whether
"he had in view or intended an unlawful pref-
"erence at a later time, at the time when the
"creditor sees fit to cause the judgment to be
"entered. For, we repeat, it is a fraudulent in-
"tent existing in the mind of the debtor at this
"later time which the act of congress has in
"view. The preference must be accompanied

"by a fraudulent intent and it is that intent "that taints the transaction. Without it the "judgment and execution are not void. . . . "It has been suggested, in opposition to the view "that we have taken, that if a creditor may "hold a confession of judgment by his debtor, "or a warrant of attorney to confess a judgment "without causing it to be entered of record un- "till the insolvency of the debtor appears, the "debtor may thereby be able to maintain a false "credit. If this be admitted it is not perceived "that it has any legitimate bearing upon the "question before us. The bankruptcy act was "not aimed against false credits. . . . It "was to secure equality of distribution of that "which insolvents have when proceedings in "bankruptcy are commenced and of that which "they have ~~conclusively~~ with some of their "creditors attempted to withdraw from ratable "distribution, with intent to prefer some "creditors over others. . . . It is not "claimed that the defendants obtained more "than they gave in return. The exchange, in- "stead of impairing the debtor's estate actually "benefited it. . . . It was, therefore, such "an exchange as the debtors might lawfully "make and as the creditors might lawfully ac- "cept."

Transfers of property made in pursuance of an agreement entered into at the time the ad-

vances were made, as security for such advances, and concluded after insolvency in pursuance of the agreement, *held* not to be an act of bankruptcy.

Re Potts, Crabbe, 469, at p. 477.

2. The contract in question, made by the savings bank with the national bank when the deposit was made, embodying, as it did, the state statute, and creating, as it did, an equitable lien or an equitable assignment, was not made in contemplation of insolvency. It was made at a time when the bank was a going institution, receiving deposits and transacting its daily business profitably and successfully. Of course, these deposits were not made after the bank had committed an act of insolvency and under the definitions above given as to the meaning of the words "in contemplation of insolvency," to hold that this contract, as to the deposit, was made in contemplation of insolvency would be to practically invalidate any security ever given by a borrower to a lender.

3. Nor is this contract a *secret lien*. The resulting lien arises only from the operation of a law which has been standing upon the statute books of the state of New York for twenty years, with which all parties dealing with the bank must be deemed to

be familiar. No broader or more complete notice of this lien could be given in any possible way.

4. The enforcement of this lien works no harm to other depositors. Without it the bank could not have obtained the deposit. The national bank might have refused to accept the deposit under these terms, but the savings bank had no discretion. It could only deposit upon the conditions of this statutory contract. The use of that deposit was to the advantage of all of the depositors of the depository bank. The assets of the bank were thus increased by every dollar for which the lien is claimed, and no harm could possibly result by this transaction to the other creditors of the bank.

5. It is no answer to the contention of the defendant in error in this case to say that such a contract could be made with every one and proportionate distribution thereby defeated.

a. We are dealing with a right given by the state of New York to one class of creditors only; a right founded in the highest conception of public policy, and in line with the theory of all savings bank legislation, which is to surround

the funds of savings banks with every possible protection. The savings bank is limited in its powers. It is not permitted to make any other contract of deposit with the national bank. If this case should be held to be an exception to a general rule it would work no harm for it would be an exception founded upon the broad principles of public policy and justice.

b. The same argument, namely, that this theory would point out an easy way for the practical defeat of the banking act, was raised just as vigorously when the validity of pledges made by national banks to secure deposits was first called in question and when the right of set-off was challenged, but has had no weight with this court. See Scott v. Armstrong, Chem. Nat. Bank v. Armstrong, Philler v. Yardley, Fisher v. Continental Nat. Bank, *supra.*

6. This is not an action to recover money wrongfully diverted where the specific moneys must be traced and identified. This is not a trust created by the wrongful act of the depository bank ; but even if it were a question of a trust created by the bank in accepting the deposit, authority may be found for enforcing it.

See San. Diego Co. v. Cal. Nat. Bank, (U. S. Circ. Ct. Cal., Oct. 1892. 52 Fed. Rep., 59).

In this case the treasurer and collector of San Diego County had made deposits of county funds in the California National Bank, in violation of the laws of California. (Cal. Polit. Code, 4161). The bank became insolvent, a receiver was appointed by the U. S. comptroller, and a controversy arose between the county and the other depositors in the bank, as to the distribution of the funds under the sections of the before quoted U. S. revised statutes, the county claiming a preference as to the funds so deposited, and other creditors claiming that they should be paid *pro rata*.

The U. S. Cir. Ct., per Ross, J., in this case held (see 52 Fed. Rep., at p. 62), that the county was entitled to the perference; that the deposits not having been made as special deposits as required by the California statute (Cal. Polit. Code, 4161) but as general deposits, in violation of such statute, were impressed with a trust in favor of the county, although mingled with the general funds of the bank; that such trust must be recognized in the distribution of the assets as a charge upon the entire mass; citing late U. S. Sup. Ct. cases, as to the point that the mingling of the funds and the inability to identify them does not prevent a court of equity from enforcing the trust.

See also Massey v. Fisher, 62 Fed. Rep., 958, *supra*.

Seventh Point. — It is conceded by both parties to this controversy, and it is now the settled practice, that such actions as this may be brought in state courts, and that the receiver alone may be a party.

In the earlier cases there was a conflict of practice in this respect, but the matter must now be considered as finally determined. A receiver was not permitted to remove the case to the United States Court.

Bird's Exec. v. Cockram, 2 Woods, 32,
S. C., 1 Nat. Bank cases, 284.

National banks and their receivers can sue and be sued in the state courts of their domicile.

Adams v. Dannis, 29 La. Ann., 315.

Snyder's Sons Co. v. Armstrong, 37 Fed. Rep., 18, and Armstrong v. Warner, Ohio St. May 1892, 31 N. E., 877, were actions in equity by a debtor against the receiver alone to have a set-off declared. Hughitt v. Hayes, 136 N. Y., 163, was an action against the receiver alone to compel specific performance involving a set-off. Chem. Nat. Bank v. Armstrong, 59 Fed. Rep., 372, was an equity action against a receiver alone to fix the amont of the dividends, and in none of these cases did the question of proper parties appear to have been raised or discussed.

In Sioux Falls Nat'l Bank v. 1st Nat'l Bank, 50 N. Y., 829, it was held that a receiver of a national bank, appointed by the comptroller of the currency, was entitled to be substituted as sole defendant in an action against the bank commenced before his appointment, and that it was improper that the bank should be joined with him.

The receiver represents the bank, its stockholders and its creditors.

Case v. Terrell, 11 Wall., 199.

The receiver is a statutory assignee, represents both the creditors and the bank and sueing in his own name, need not make either a party.

Kennedy v. Gibson, 8 Wall., 498, at p. 506.

The bank is only a nominal party in an action for money collected, &c.

Grant v. Spokane Nat'l Bank, 47 Fed. Rep., 673.

The judgment in a case where the receiver is sued alone may provide for his paying the claim or for his certifying the same to the comptroller to be paid in the course of administration.

Case v. Bank, 100 U. S., 446.

Eighth Point.— The defendant in error claims to have established the following propositions :

(I.)

The decision of the highest court of the State of New York has been had and is conclusive upon the following points :

a. The state statute in question applies to national banks.

b. The statute became a part of the contract of deposit.

c. The contract so made vested in the savings bank a present property right, in the nature of an equitable lien operating as an equitable assignment of the assets of the national bank in case of its insolvency, and was made for a present consideration of equal value with the security given.

(II.)

The statute which effected this result is within the proper sphere of state legislation.

a. It relates to the transaction of daily business of a going national bank and regulates its relations with its customers within the state of which it is a citizen.

(III).

The right or equity thus accruing to the savings bank at a time when its deposit was made is one of a class held by this court entitled to recognition by a receiver of a national bank, notwithstanding the provisions of Sections 5236 and 5242 of the revised statutes of the United States.

The state banking law therefore does not conflict with the national bank act and should be given full effect by this court.

(IV.)

It follows that the savings bank when it made its deposit acquired a valid right to have such deposit first paid in the event of the insolvency of the national bank, and the receiver of the latter should be by this court directed to recognize and comply with its claims for that relief.

Ninth Point. — The judgment of the New York Court of Appeals in this case should be affirmed with costs.

Dated February 23rd. 1895.

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